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No. 02-1311

In the

Supreme Court of the United States

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips, Deceased,

Petitioner,

v.

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMER, M.D., individually;
JOHN BEARRY, M.D., individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MONROE COUNTY, MISSISSIPPI

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QUESTION PRESENTED

Whether the refusal of the United States Court of Appeals for the Fifth Circuit to extend the "loss of chance" doctrine of causation developed at common law for medical malpractice actions to this wrongful death action brought under 42 U.S.C. § 1983 was error.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 02-1311

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

Petitioner,

versus

MONROE COUNTY, MISSISSIPPI; CHARLES FARMER, M.D., individually; JOHN BEARRY, M.D., individually,

Respondents

Respondent Monroe County, Mississippi respectfully requests that this Court deny the Petition for Writ of Certiorari to review the United States Court of Appeals for the Fifth Circuit's affirmance of the underlying case.

OPINIONS AND ORDERS BELOW

The May 9, 2001, opinion and judgment and order of the United States District Court for the Northern District of Mississippi, dismissing the underlying case on motion for judgment as a matter of law at the conclusion of the Petitioner's case, are reported at 143 F.Supp.2d 663 (N.D. Miss. 2001) and reproduced in the Petition for Writ of Certiorari at Appendix B and Appendix C, respectively. The October 28, 2002, decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment is reported at 311

F.3d 369 (5th Cir. 2002) and reproduced in the Petition for Writ of Certiorari at Appendix A. The November 7, 2002, petition for rehearing to the United States Court of Appeals for the Fifth Circuit is unreported and reproduced in the Respondent's Appendix. The December 9, 2002, order of the United States Court of Appeals for the Fifth Circuit denying rehearing is reported at 311 F.3d 369 (5th Cir. 2002) and reproduced in the Petition for Writ of Certiorari at Appendix D.

ADDITIONAL STATUTES INVOLVED

Miss. Code Ann. § 91-7-233 (Rev. 1994) provides:

> Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. They shall also be liable to be sued in any court in any personal action which might have been maintained against the deceased.

Miss. Code Ann. § 11-7-13 (Supp. 2002) provides:

> Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person shall be caused by the breach of any warranty, express or implied, of the

purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its

merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may assert or maintain a claim for any breach of expressed warranty or for any breach of implied warranty. A wrongful death action may be maintained or asserted for strict liability in tort or for any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased, or by all interested parties, such party or parties

may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children,

nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting parent or adopting parents surviving their deceased adopted child, just as if the child were theirs by the full blood and had been

born to the adopting parents in lawful wedlock.

STATEMENT OF THE CASE

Petitioner filed her complaint on behalf of the wrongful death beneficiaries[1] of Jonathan Phillips, claiming that "[t]he death of Jonathan Phillips was directly and proximately caused by the failure of Monroe County, Mississippi, to have in place procedures and policies to provide needed medical care, in violation of the Eighth Amendment Cruel and Inhuman Punishment Clause of the United States Constitution" made actionable through 42 U.S.C. § 1983. R. 1-3.[2] At the conclusion of Petitioner's case,[3] Respondents moved

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[1] Mississippi's Wrongful Death Statute, Miss. Code Ann. § 11-7-13 (Supp. 2002), creates a new and independent cause of action in favor of the beneficiaries named therein. *Estate of Jones v. Howell*, 687 So.2d 1171, 1178 (Miss. 1996).

[2] Petitioner's Amended Complaint named Respondents Dr. Charles Farmer and Dr. John Bearry as additional defendants. R. 177-87.

[3] Petitioner's statement of the case is misleading in a number of respects. First, to the extent that Petitioner implies (Petition at 5) that cancer spread to the decedent's brain between June 29, 1998 and July 18, 1998, due to the absence of chemotherapy in that timeframe, the record is undisputed that cancer was existing in decedent's brain for at least six months prior to his death. T. 351-52, 379; Pet. App. 8. Second, to the extent Petitioner implies that the State of Mississippi Department of Corrections had no capacity to provide chemotherapy (*see* Petition at 4-5), the record reflects that although there was no chemotherapy available at the Parchman facility or the Rankin County facility, there was an agreement between the Mississippi Department of Corrections and the University Medical Center in Jackson, Mississippi, to provide treatment, and all Department of Corrections' inmates with cancer were treated at University Medical Center. T. 353-54. Finally, as to Petitioner's contention that the decedent was transferred without

for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, arguing, *inter alia*, that Petitioner failed to establish any causal connection between the alleged acts and omissions of Respondents and the death of Jonathan Phillips. T. 470-72.

In response, Petitioner conceded "that there's been no proof of proximate cause, that is, that he would have survived." T. 482; *see also* T. 487-88 ("substantial overwhelming evidence . . . probably . . . indicates" no causal connection between failure to provide chemotherapy on June 29 and Jonathan Phillips's death). Admitting that she had no § 1983 case on point and citing a medical malpractice case regarding loss of chance of survival,[4] Petitioner contended that damages

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assurance that the state had available the capability of providing inmates with chemotherapy (Petition at 4), the record reflects that the Monroe County Sheriff's Department contacted the office of Dr. John Bearry, the Medical Director at Parchman State Correctional Facility, and explained that they had an inmate with recurring cancer who needed chemotherapy. T. 283-84, 293, 398-99. Dr. Bearry's office instructed the Sheriff's Department to transport the decedent to the state's facility in Rankin County where he would receive treatment. T. 283-84; Pet. App. 3. It was the chief deputy's understanding that treatment would be rendered that day or the next day. T. 285-86.

[4] Petitioner admitted that her suit against the Respondent physicians was not one for medical malpractice. T. 483. Petitioner's argument for "loss of chance" is based upon the testimony of Jonathan Phillips's treating physician, Dr. Julian Hill, of "[p]erhaps a 30 to 40 percent chance that he would have had some temporary remission of his cancer with further conventional chemotherapy of the type that I had planned to administer for him." T. 221. It is clear, however, that Dr. Hill's testimony was based upon "Jonathan's condition and his prognosis at that point," that is, at the time Dr. Hill set up the chemotherapy treatments, being June 25. T. 220. Petitioner admitted that at the time he recommended chemotherapy, Dr. Hill had no evidence that the cancer had already metastasized in Jonathan Phillips's brain. T. 490.

for mental anxiety resulting from Respondents' alleged failure to provide medical treatment should be available. T. 482-84. The district court granted judgment as a matter of law to Respondents. T. 499-501; Pet. App. B.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed due to Petitioner's "fail[ure] to prove the necessary causal link between the Decedent's death and the acts or omissions of the [Respondents.]" Pet. App. 2. The court rejected Petitioner's contention that it was unnecessary for her to prove that chemotherapy would have saved the decedent's life. First, the court explained that had Petitioner brought the suit as a survival action, "the causation analysis would be different because that type of claim redresses any constitutional injuries suffered by the Decedent *before* his death." The court of appeals "carefully reviewed the record for any evidence that this suit was brought as a survival action" and concluded that while the record was "somewhat ambiguous in this regard," Petitioner never referred to herself as the personal representative of the decedent, a requirement for a survival action under Mississippi law. Pet. App. 6 n.1, App. 9. Second, the court of appeals "decline[ed] to expand the 'loss of chance' doctrine beyond its normal context of medical malpractice." Pet. App. 10.

In the original opinion, the court of appeals noted that Petitioner did not allege "that her constitutional rights were violated." Pet. App. 5-6. On petition for rehearing, the court explained that while one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action, "[P]etitioner, . . . failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the [P]etitioner's rights." Pet. App. 26.

The Petition for Writ of Certiorari challenges the appellate court's refusal to adopt the "loss of chance" doctrine and to ignore Petitioner's failure to bring either an individual action or survival action.

REASONS FOR DENYING THE WRIT

A. The Petition is fundamentally flawed.

The Petition is fundamentally flawed in two respects. First, the Petition fails to recognize the nature of and distinction between survivor and wrongful death actions. At common law, a personal claim was extinguished upon the death of either the injured party or the alleged wrongdoer. *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978). Further, damages were not recoverable in tort by anyone for the death of a human being. *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344-45 (1937). To ameliorate the harshness of these common law rules, statutory survivor and wrongful death actions were enacted. *See Robertson*, 436 U.S. at 589 (survivor statutes); *Van Beeck*, 300 U.S. at 344 (wrongful death statutes). In *Van Beeck*, the Court recognized:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death."

Van Beeck, 300 U.S. at 347 (quoting *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U.S. 648, 658 (1915) (discussing the Employers' Liability Act (April 22, 1908, chap. 149, §1, 35 Stat. at L. 65, 45 U.S.C.A. § 51, as amended April 5, 1910, chap. 143, § 2, 36 Stat. at L. 291, 45 U.S.C.A. § 59))).

In arguing, on the one hand, that the court of appeals "refus[ed] to apply the common law principle that the loss of a chance for survival is actionable" (Petition at 8) and arguing, on the other hand, that the court of appeals "decide[ed] the issue by looking to hypertechnical state law distinctions between 'survivorship' and wrongful death actions" (Petition at 13), the Petition is fundamentally flawed. Without the "hypertechnical" state law statutes, the common law would bar or abate the action altogether.

Second, the Petition confuses the causation issue in two respects. The court of appeals recognized that Petitioner's references to "the fright and anxiety" both she and the deceased suffered because of the delay in chemotherapy, "confuse . . . the causation issue." The court stated that had Petitioner brought a survival action, damages for the decedent's physical suffering and mental anxiety as a result of the alleged deprivation of medical care "would have been appropriate." In her wrongful death action, however, "no damages are available until the plaintiff has cleared the causation hurdle." Pet. App. 9.

Further, Petitioner argues that the court of appeals was required by *Robertson* to apply the common law "loss of chance" doctrine of diminished causality. Petition at 7-9.[5] Petitioner assumes, without citation of

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[5] In *Bach v. Trident Steamship Co.*, 920 F.2d 322 (5th Cir. 1991), the United States Court of Appeals for the Fifth Circuit explained the doctrine as follows: "Under this doctrine, which as far as we can

authority, that the decision as to causation is governed by 42 U.S.C. § 1988. This statute instructs that when federal law is "'deficient in the provisions necessary to furnish suitable remedies and punish offenses against law,'" the court must "turn to 'the common law, as modified and changed by the constitution and statutes of the [forum] State.'" *Robertson*, 436 U.S. at 585 n. 1, 588 (quoting 42 U.S.C. § 1988) (brackets by the Court)). *Robertson* looked to the survival statute of the forum state because "one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'" *Robertson*, 436 U.S. at 589 (quoting *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973)).

Petitioner has cited no authority that federal law relating to causation is "deficient." Section 1983 provides: "Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. There is, thus, a "causation requirement set out on the face of § 1983." *St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality opinion). Additionally, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). In *Collins v. Harker Heights*, 503 U.S. 115 (1992), the Court stated that "proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) *whether plaintiff's harm was caused*

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tell, has been confined to medical malpractice cases, plaintiffs who cannot meet the ordinary standards of causation are allowed to recover for negligent conduct that decreases their chances of survival." 920 F.2d at 327 (declining to apply doctrine "well beyond the context in which it has been developed").

by a constitutional violation, and (2) if so, whether the city is responsible for that violation." 503 U.S. at 120 (emphasis added). In *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), the Court emphasized that that "whatever the constitutional basis for § 1983 liability, such damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.'" 477 U.S. at 309 (quoting *Carey v. Piphus*, 435 U.S. 247, 265 (1978) (emphasis and brackets by *Memphis Community School Dist.* Court)). Death may be "too remote a consequence" of a challenged action to hold one "responsible under the federal civil rights law. Although a § 1983 claim has been described as 'a species of tort liability,' it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." *Martinez v. California*, 444 U.S. 277, 285 (1980) (citation omitted; quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). The causation requirement arises from § 1983 itself. Petitioner has cited no authority that the court of appeals was required to look to § 1988 incorporation of forum state law to interpret the causation requirement.

B. The Fifth Circuit Court of Appeals Clearly Followed *Robertson v. Wegmann*

Petitioner's contention that the court of appeals' refusal to expand the "loss of chance" doctrine constitutes disregard for this Court's decision in *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978)) is without merit. *Robertson* held, "Under § 1988 . . . *state statutory law*, modifying the common law, *provides the principal reference point in determining survival of civil rights actions*, subject to the important proviso that state law may not be applied when it is

'inconsistent with the Constitution and laws of the United States.'" *Robertson*, 436 U.S. at 589-90 (quoting 42 U.S.C. § 1988) (emphasis added)). Mississippi statutory law is exactly what the court of appeals applied to determine that Petitioner had not brought a survival action in the instant case. Section 91-7-233 of the Mississippi Code provides that a personal action survives to the "executors, administrators, and temporary administrators" of the deceased. Miss. Code Ann. § 91-7-233 (Rev. 1994). The court of appeals determined that Petitioner "does not seek relief as the personal representative of the Decedent's estate" and ruled that "without alleging the appropriate legal status, P[etitioner] could not have brought a survival action." Pet. App. 6 & n.1. Petitioner has cited no authority that requiring a survival action to be maintained by the personal representative of the deceased is "inconsistent with the Constitution and laws of the United States." In *Robertson*, the Court noted that, "For those actions that do not abate automatically on the plaintiff's death, most States apparently allow the personal representative of the deceased to be substituted as plaintiff." *Robertson*, 436 U.S. at 591 n.7. The court of appeals clearly followed *Robertson* in the instant case.

As discussed above, Petitioner has cited no authority that issues of causation are to be analyzed under *Robertson*'s § 1988 analysis. However, whether under that analysis or under an interpretation of § 1983's causation requirement itself, Petitioner has cited no authority which would require expansion of the "loss of chance doctrine" to the instant case. Petitioner admitted to the district court that she had no § 1983 case supporting her "loss of chance" theory. T. 482-84.[6] The

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[6] In fact, Petitioner prefaced the argument, "Your Honor, there's [sic] interesting question that I have not been able to find any 1983 law on." T. 482.

court of appeals "decline[ed] to expand the 'loss of chance' doctrine "beyond its normal context of medical malpractice." Pet. App. 10 (citing *Bach v. Trident Steamship Co.*, *supra*).

In the event the common law of the forum state were applicable, Mississippi clearly applies the doctrine only to medical malpractice actions. In *Clayton v. Thompson*, 475 So.2d 439 (Miss. 1985), recognizing that "our approach to the requirement of causation in medical malpractice cases necessarily differs from that employed in most other tort contexts," the Mississippi Supreme Court adopted Mississippi's version of the doctrine as follows: "[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." The court held that "Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.'" 475 So. 2d at 445. The "clear common law principle" advanced by Petitioner "that one is subjected to liability whenever his unlawful actions diminish the chances of the decedent's survival," (Petition at 7) was, thus, clearly rejected by the *Clayton* court.

In *Ladner v. Campbell*, 515 So.2d 882 (1987), the Mississippi Supreme Court explained:

> Some courts have held that the plaintiff has to supply evidence that proper treatment would have provided the patient "with a greater than fifty (50) percent chance of a better result than was in fact obtained." 54 A.L.R.4th 10 § 2[a]. The *Clayton* decision clearly placed the Mississippi rule in alignment with these

> jurisdictions, and rejected the notion that a mere "better result absent malpractice" would meet the requirements of causal connection.

Ladner, 515 So.2d at 889 (quoting John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 10 (1987) § 2[a]). Petitioner's quotation from the same annotation that "Courts 'are united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice'" glaringly omits the prefatory language "those adopting the alternative view". *Compare* Petition at 8 (quoting 54 A.L.R. 4th at 19) *with* 54 A.L.R. 4th at 19. A more thorough reading of the annotation reflects that the position advanced by Petitioner is "[a]n alternative view" among "[d]iverging positions." 54 A.L.R. 4th at 18-19. The annotation identifies Mississippi as being a jurisdiction which requires "greater than 50 percent chance of better result." *See* 54 A.L.R. 4th at 30-31. Contrary to Petitioner's contention, there is no "clear common law principle" (Petition at 7) even in the area of medical malpractice.

Petitioner's contention that the court of appeals' refusal to expand the "loss of chance" doctrine disregards *Robertson* is without merit.

C. The Conflict Among the Circuits Identified by Petitioner is Irrelevant to the Case at Bar

While there is a conflict among the United States Circuit Courts of Appeals regarding whether recovery for wrongful death actions is appropriate under § 1983, that conflict is irrelevant to the case at bar. The Court

of Appeals for the Fifth Circuit "ha[s] consistently allowed" such recovery (Pet. App. 7) and would have allowed it in the case at bar had Petitioner proved the essential elements of her case. Petitioner has received the benefit of the conflict among the circuits; she has not identified which circuit approach, if any, would allow her to recover under the facts of this case.[7] Petitioner did not raise in the court below any contention that the approach of a different circuit court of appeals would allow her recovery. *See* Resp. App. 1a-25a.

Long before *Robertson*, the United States Court of Appeals for the Fifth Circuit recognized that "federal law is not suitable, i.e., sufficient, since it leaves a gap for death in a substantive policy making no distinction between violent injuries and violent death" and that "state law is to be used to the extent that it is currently available to overcome these deficiencies." *See Brazier v. Cherry*, 293 F.2d 401, 408 (5th Cir. 1961). "To make the policy of the Civil Rights Statutes fully effectual," the Fifth Circuit Court of Appeals incorporates both state survival and wrongful death actions pursuant to § 1988. 293 F.2d at 409.

Other circuit courts decline to incorporate state wrongful death statutes for a variety of reasons. In *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984), the Court of Appeals for the Sixth Circuit determined that since § 1983 creates a "personal [cause of] action cognizable only by the party whose civil rights had been violated," state wrongful death actions which create new and separate claims or causes of action for damages in favor

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[7] Notably, Petitioner has not identified any conflict among the circuits with respect to the "loss of chance" doctrine in § 1983 death cases. Petitioner admitted to the district court that she had no § 1983 support for her position. T. 482-84.

of the persons identified in the statute, are not "equivalent" and should not be incorporated into § 1983. 739 F.2d at 242-45 (holding that since state wrongful death action inappropriate under § 1983, and state survival action by itself insufficient to champion civil rights of deceased, "a personal cause of action, may be pursued in the name of the decedent's personal representative, as defined by the law of the forum jurisdiction").

The Tenth Circuit Court of Appeals disagrees that "the 'new' cause of action theory" warrants rejection of state wrongful death remedies as appropriate to vindicate § 1983 violations when death results, but believes that defining § 1983 remedies in terms of state survival action, supplemented by state wrongful death act, "place[s] into the hands of the state the decision as to allocation of the recovery in a § 1983 case, and, indeed, whether there can be any recovery at all." *Berry v. City of Muskogee*, 900 F.2d 1489, 1504-06 (10th Cir. 1990). The Tenth Circuit determined that "[a]pplication of state law, at least in some instances, will be inconsistent with the predominance of the federal interest." 900 F.2d at 1506-07 (fashioning instead "a federal remedy to be applied to § 1983 death cases . . . . a survival action, brought by the estate of the deceased victim" making available "sufficient damages to serve the deterrent function central to the purpose of § 1983").

In *Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001), the United States Court of Appeals for the Eighth Circuit determined that allowing the measure of § 1983 damages to be entirely defined by the language of the Missouri wrongful death statute "would impermissibly broaden the types of injuries for which Congress intended recovery to be available under § 1983's authorization of liability 'to the party injured.'" 253 F.3d

at 1057-58, 1063-64 (looking to Missouri wrongful death statute to determine standing for § 1983 suit where state survivorship statute and wrongful death statute were "mutually antagonistic," the state survival statute applying only when injury did not cause death; declining to allow plaintiff to "shoehorn recovery" available under state wrongful death action into recovery she may receive under § 1983 for decedent's injuries).

In *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985), the United States Court of Appeals for the Seventh Circuit held that where the state wrongful death scheme denies recovery for loss of life, it "effectively calls for abatement of [decedent's] constitutional claim" and is inconsistent with the deterrent policy of § 1983. 769 F.2d at 1189-90 (finding that "[s]uch restrictive state laws must give way to federal common law rules that permit recovery" and allowing "the estate to recover damages").

Petitioner has not made any claim that the Fifth Circuit's incorporation of the Mississippi wrongful death statute is in any way inconsistent with § 1983 policy. In fact, Petitioner brought the instant case on behalf of the wrongful death beneficiaries of Jonathan Phillips. The case was brought, tried and lost as a wrongful death action. Any detriment to Petitioner is not the result of the conflict among the circuit courts of appeal but the result of Petitioner's failure to prove the essential elements of her claim. The Fifth Circuit did not say that Petitioner could not bring a wrongful death case, but that she had failed to prove it.

Further, three of the four circuit court decisions discussed above which adopted a "federal" remedy, gave that remedy to the estate of the deceased. *See Jaco*,

Berry and *Bass*, *supra*.[8] As noted previously, Petitioner has never claimed to be the personal representative of the decedent's estate; had she done so, the Fifth Circuit would have found that she stated a survival claim under Mississippi law. *See* Pet. App. 6 & n.1. Petitioner's failure to bring the action as the personal representative of the decedent's estate bars not only her survival claim under Mississippi law but also would prevent her recovery under the Sixth, Tenth and Seventh Circuit approaches. The conflict among the circuits is irrelevant to the instant case.

D. Petitioner's Rule 17(a) "Real Party in Interest" Argument Was Not Made Below and Is Without Merit

The "real party in interest" argument advanced in the Petition for Writ of Certiorari was not raised in the court of appeals (*see* Resp. App. 1a-25a) and should not be addressed to this Court in the first instance.

Moreover, while Rule 17(a) of the Federal Rules of Civil Procedure requires that an action "be prosecuted in the name of the real party in interest," the rule does not identify the "real party in interest." The rule does, however, specifically refer to an "executor" or "administrator." *See* Fed. R. Civ. Pro. 17(a). With respect to the survival of claims under § 1983, *Robertson* held that "*state statutory law*, modifying the common law, *provides the principal reference point in determining survival of civil rights actions.*" 436 U.S. at 589-90 (emphasis added)). Section 91-7-233 of the Mississippi Code provides that a personal action survives to the "executors, administrators, and

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[8] The only case which did not do so, *Andrews*, *supra*, based standing upon state law.

temporary administrators" of the deceased. Miss. Code Ann. § 91-7-233 (Rev. 1994). The court of appeals "carefully reviewed the record for any evidence that this suit was brought as a survival action" and determined that since Petitioner never referred to herself as the personal representative of the decedent's estate, she could not have brought a survival claim. Pet. App. 6 & n.1. This reasoning is in accord with *Robertson's* identification of state statutory law as the "principal reference point in determining survival of civil rights actions." The court of appeals did not say that no one could bring an action for the mental suffering Jonathan Phillips allegedly experienced prior to his death, but that Petitioner, not being the personal representative of the estate, could not do so.

Further, while the court of appeals recognized "that one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action," the court determined that Petitioner "failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the petitioner's rights." Pet. App. 12. The Petition for Writ of Certiorari does not identify which constitutional rights of Petitioner the Respondent is alleged to have violated.[9] While the Petitioner would be the "real party in interest" to assert a claim for violation of her own constitutional rights, the court of appeals determined that she had brought no such claim in the instant case.

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[9] Petitioner's reference to authorities which allow one to "sue for violations of his own rights in federal court where the unconstitutional killing of another has injured him" (Petition at 13) are clearly inapposite. The court of appeals determined there to be no causal connection between the alleged acts or omissions of Respondents and the death of Jonathan Phillips. Pet. App. 2. There was no "unconstitutional killing" in the case at bar.

CONCLUSION

The Petition for Writ of Certiorari is without merit. While there is a conflict among the circuits regarding incorporation of wrongful death actions into § 1983, that conflict is irrelevant to the case at bar. Moreover, there is no conflict among the circuits regarding "loss of chance" in wrongful death § 1983 cases. Petitioner admitted to the district court that she had no § 1983 authority to support her contention; she has cited none in the Petition. Therefore, the Petition for Writ of Certiorari should be denied.

DATED: May 9, 2003

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

PLAINTIFF/APPELLANT,

VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
JOHN BEARRY, individually,

DEFENDANTS/APPELLEES.

PETITION FOR REHEARING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION
Glen H. Davidson, United States District Judge

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UNITED STATES COURT OF APPEALS
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VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
JOHN BEARRY, individually,
DEFENDANTS/APPELLEES.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Sandra Phillips, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal pursuant to Rule 13.6.1 of the United States Court of Appeals for the Fifth Circuit.

A. Sandra Phillips, Appellant;

B. Jim Waide, Counsel for Appellant;

3. Kristy L. Bennett, Counsel for Appellant;

4 Waide & Associates, Counsel for Appellant;

5. Monroe County, Mississippi, Appellee;

6. Dr. Charles Farmer, Appellee;

7. John Bearry, Appellee;

8. Bradley Dillard, Counsel for Appellee Monroe County, Mississippi;

9. John L. Clay, Counsel for Appellees Charles Farmer and John Bearry; and

10. Leonard Vincent, Counsel for Appellees Charles Farmer and John Bearry.

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips
PLAINTIFF/APPELLANT,

VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
JOHN BEARRY, individually,
DEFENDANTS/APPELLEES.

STATEMENT OF THE ISSUES

1. Whether the Court erred in deciding to apply state law and common law principles when there was no applicable federal law?

2. Whether the Court erred in applying principles of "survivorship" to deny Phillips' claim she herself suffered harm by reason of Defendants' unconstitutional acts?

COURSE OF PROCEEDINGS/FACTS

By Opinion dated October 28, 2002, this Court: (1) determined that the common law principles developed in medical malpractice cases do not apply in suits under 42 U.S.C. § 1983; and (2) held that Plaintiff cannot proceed for damages for her own pain and suffering as a result of the deprivation of medical care because this is a "wrongful death action," not a "survival" action.

This Court summarized the view which the Court must take in considering the evidence as follows:

> In other words, we must give credence to the evidence supporting the nonmovant as well as any evidence supporting the moving party that is uncontradicted, unimpeached, and not attributable to interested witnesses.

Slip Op., p. 2, *citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2002).

So viewing the facts, they may be simply stated.

On June 24, 1998, while Jonathan Phillips was in the Monroe County Jail, the Monroe County Sheriff's Department received a note from the Decedent's cancer physician, Dr. Hill, that "Jonathan has recurrent testes cancer and needs to receive salvage chemotherapy - preferably high-dose therapy ..." R. Vol. 4, p. 20-21.

Jonathan's aunt, Diane Hunt, discussed transporting Jonathan to Tupelo, Mississippi for chemotherapy with Monroe County Chief Deputy Burks. The chemotherapy was scheduled for June 29, 1998. *Id.* at 22-23. The deputy declined to have Jonathan transported to Tupelo for the chemotherapy because he

"didn't have the manpower," *Id.* at 23, and even refused to allow Hunt, herself a deputy, to transport him. *Id.* at 22-23.

Instead of taking Jonathan for the scheduled chemotherapy on June 29, 1998, and in order to save the county expense of having to pay for the chemotherapy treatment, the county contacted employees of the state correctional facility to persuade them to take Jonathan off its hands. The county arranged for Jonathan to be transported to the state correctional facility without any assurance that there could be any immediate treatment as Jonathan needed. See R. Vol. 6, pp. 395-96, 401.

On June 29, when Jonathan was supposed to be having his chemotherapy in Tupelo, he was instead transported to the State Department of Corrections facility in Rankin County, Mississippi. Had Rankin County officers been told of the need for immediate chemotherapy, they would not have accepted Jonathan for treatment. R. Vol. 4, p. 93.

In fact, the state correctional facility had no available means to afford immediate chemotherapy treatment, *Id.* at 117-118, and according to state officials, no one would have told the Monroe County Sheriff's Department that chemotherapy could be immediately administered.

Jonathan, upon learning that he was not going to receive the chemotherapy, was "terrified." *Id.* at 429. Similarly, Jonathan's mother "fell apart" when informed there was no immediate chemotherapy treatment available. *Id.*

No chemotherapy treatment was provided to Jonathan and he died on July 18, 1998, never having

received the chemotherapy treatment that was supposed to have begun in Tupelo, Mississippi on June 29, 1998.

District Judge Davidson directed a verdict for the Defendants on the ground that Plaintiff had not produced the necessary proof to demonstrate Defendants were deliberately indifferent to Jonathan's known medical needs. R. Vol. 6, pp. 501-02.

This Court affirmed by finding Plaintiff could not recover for wrongful death because she could not prove that Jonathan would have survived even had the chemotherapy treatment been provided as directed. Also, this Court found Jonathan and his family could not recover for the pain and fright they suffered because this was a "wrongful death action," and not a survival action. Slip Op., p. 4.

ARGUMENT I.

THE COURT ERRED BY FAILING TO APPLY THE COMMON LAW PRINCIPLE THAT DIMINISHING A PATIENT'S CHANCE FOR SURVIVAL IS A LEGAL CAUSE OF INJURY.

This Court would not permit Plaintiff's wrongful death claim to go to the jury because it concluded that the evidence did not demonstrate that immediate chemotherapy would have saved Jonathan's life. This Court noted that Dr. Hill (the Tupelo physician) further admitted at trial that "even with the salvage chemotherapy he had prescribed, the Decedent could, at most, have hoped for a thirty to forty percent chance of some temporary remission of his cancer..." Slip Op., p. 3.

Thus, this Court rejected Plaintiff's argument that she "need only prove the defendants' actions increased the Decedent's risk of death due to cancer." Slip Op., p. 4. Dr. Hill's testimony that the chemotherapy would have increased by "thirty to forty percent" the chance of a temporary remission of cancer, Slip Op., p. 3, was, thus, insufficient for liability. According to this Court: "In sum, there is no evidence in the record of any possible medical treatment that Monroe County or the individual defendants could have provided to save the life of the Decedent." Slip Op., p. 4. Plaintiff's claim that diminishing the chances of surviving by refusing the chemotherapy was rejected based on this Court's holding that: "the supporting cases ... relate to medical malpractice suits and are not relevant here." Slip Op., p. 4.

42 U.S.C. § 1988(a) provides that whenever civil rights statutes are "deficient" in not providing "suitable remedies," a court is to apply the "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,..."

There is nothing in 42 U.S.C. § 1983 which states whether or not Plaintiff's proof that the Defendants' actions decreased the chances of survival is sufficient proof of causation. However, there exists an analogous common law principle developed in the context of medical malpractice actions. In these common law actions, it has been repeatedly held that a medical doctor is subjected to liability whenever his improper actions diminish the chances of the decedent to survive. See generally Annotation, *Medical Malpractice: "Loss of Chance Causality"*, 54 ALR 4th 19 (1987). As explained in *Boburka v. Adcock*, 979 F.2d 424 (6th Cir. 1992),

"[t]his theory allows a medical malpractice plaintiff to recover if he produces evidence that the defendant physician's malpractice reduced the patient's chances for a better outcome, even if the chance of the better outcome without the physician's negligence was less than fifty percent." 979 F.2d at 429. Courts "are united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice." John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 19 (1987). For example, in *Herskovits v. Group Health Cooperative*, 99 Wash.2d 609, 664 P.2d 474 (Wash.1983), the Washington Supreme Court held that the reduction of a patient's chance for survival from thirty-nine percent to twenty-five percent due to a negligent failure to diagnose his cancer was sufficient proof of causation for the case to go to a jury. *See also James v. United States*, 483 F.Supp. 581, 587 (N.D. Cal.1980) ("[n]o matter how small that chance may have been–and its magnitude cannot be ascertained–no one can say that the chance of prolonging one's life or decreasing suffering is valueless").

There being nothing in 42 U.S.C. § 1983 dealing with whether denying the chance of prolonging life is actionable, this Court must look to the common law to find the gage. *Robertson v. Wegmann*, 436 U.S. 584 (1978) held that since 42 U.S.C. § 1983 has no law on whether a 1983 action survives the death of the plaintiff, the court looks to state law for that decision:

> As both courts below held, and as both parties here have assumed, the decision as to the applicable survivorship rule is governed by 42 U.S.C. §§ 1988. This statute recognizes that in certain areas "federal law

> is unsuited or insufficient 'to furnish suitable remedies' "; federal law simply does not "cover every issue that may arise in the context of a federal civil rights action." *Moor v. County of Alameda*, 411 U.S. 693, 703, 702, 93 S.Ct. 1785, 1792, 36 L.Ed.2d 596 (1973), quoting 42 U.S.C. §§ 1988. When federal law is thus "deficient," §§ 1988 instructs us to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," as long as these are "not inconsistent with the Constitution and laws of the United States." See n. 1, *supra*.

436 U.S. at 588-89[1].

Having found 42 U.S.C. § 1983 did not address the issue, and having found there was an analogous principle of state law, the Supreme Court held that 42 U.S.C. § 1988(a) required application of state law.

In this case, there is no section 1983 rule with respect to whether proving that the willful indifference of a tort feasor, decreasing the chances of a civil rights' victim to survive is actionable. There is, however, an

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[1] Consistent with *Robertson, supra*, this Court has normally held that state law controls wrongful death issues. *See Delesma v. City of Dallas*, 770 F.2d 1334 (5th Cir. 1985); *Granstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); and the leading case, *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961). By refusing to follow applicable common law on the chance of survival issue, this Court acts inconsistently with these much earlier Fifth Circuit decisions.

analogous rule of the common law. This rule of the common law, developed in medical malpractice cases, is that decreasing one's chances to survive is sufficient to fasten liability. 42 U.S.C. § 1988(a), thus, dictates applicability of this rule.

This Court cited no reason for not applying 42 U.S.C. § 1988(a) except the fact that in a Jones Act case, *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322 (5th Cir. 1991), did not apply this common law medical malpractice rule. The Jones Act, however, has no provision such as 42 U.S.C. § 1988, incorporating a state common law rule of decision. *Bach* is, therefore, irrelevant and is not authority to disregard 42 U.S.C. § 1988(a).

By deciding not to apply the common law rule, without citing to 42 U.S.C. § 1988(a), this Court has acted inconsistently with the Supreme Court's teaching in *Robertson, supra*, as well as the express language of 42 U.S.C. § 1988(a). *See also, Burnett v. Grattan*, 468 U.S. 42 (1984) (where federal laws do not provide an applicable rule, courts must apply state law rule of decision unless it is "inconsistent with federal law").

ARGUMENT II.

THIS COURT ERRED IN *SUA SPONTE* RULING THAT PLAINTIFF COULD NOT RECOVER FOR HER OWN PAIN AND SUFFERING CAUSED BY THE DELAY IN THE CHEMOTHERAPY TREATMENTS ON THE THEORY THAT PLAINTIFF DID NOT BRING A "SURVIVAL" ACTION.

Besides ruling that Plaintiff has no claim for wrongful death because she could not prove that Jonathan

would have survived, this Court also ruled that Jonathan's and Sandra's suffering from the delay in providing chemotherapy treatment could not provide a cause of action. This ruling was made upon the theory that this action is a "wrongful death" action and not a "survivor" action, which may only be brought by an administrator. This Court explained its position in this regard in a footnote saying:

> Importantly, however, Phillips never refers to herself or any of the plaintiffs as personal representatives of the Decedent's estate, nor does she clearly assert that she is in fact the Decedent's executor or administrator. Under Mississippi's general survivorship statute, only executors, administrators, and temporary administrators may bring a survival action. Miss.Code Ann. § 91-7-233 (1994).

Slip Op., p. 3, fn 1.

Thus, while holding state common law principles of medical malpractice not applicable, the Court incorporates the principles of state law distinguishing between "survival" actions and wrongful death actions, and disallows Plaintiff's claim for the suffering suffered by Jonathan and his mother on the grounds that this is a "survivor" action, not a wrongful death action.

There are several fallacies in this Court's holding. In the first place, the distinction between "survival" actions and "wrongful death" actions was never raised by any of the Defendants. This Court does not raise for the parties issues which they did not raise on their own. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) ("It is the general rule ... that a

federal appellate court does not consider an issue not passed on below"). A party has presented an issue in the trial court if that party has raised it in either the pleadings or the pretrial order, or if the parties have tried the issue by consent. *See Myrick v. City of Dallas*, 810 F.2d 1382, 1386 (5th Cir.1987) (holding a claim not properly raised if not in pleadings, pretrial order, or evidence presented); *Laird v. Shell Oil Co.*, 770 F.2d 508, 510-11 (5th Cir.1985) (refusing to consider an issue not raised in the pleadings, pretrial order, or trial evidence). The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised. *See Simon v. United States*, 891 F.2d 1154, 1158 (5th Cir.1990) (affirming district court's finding that a party had waived an issue because the record did not put opponent or court on notice). For the Court to raise a defense for a party which the party has not raised for itself raises grave concerns about judicial impartiality. This represents the Court making arguments for one of the parties rather than acting as a judicial adjudicator of the arguments made. Since the Defendants never raised this argument, Plaintiff never had the opportunity to respond to it or to argue about whether the issue was one of "procedure" which was governed by the Federal Rules of Civil Procedure, rather than one of substantive law which would be governed by state law. *See Siroonian v. Textron, Inc.*, 844 F.2d 289, 292 (5th Cir. 1988); *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 309-10 (5th Cir. 1984); *Owens v. International Paper Co.*, 528 F.2d 606, 609 (5th Cir. 1976).

However, even assuming that the distinction between survivorship and wrongful death would have provided a defense to any claim on Jonathan's behalf for Jonathan's suffering and fright from not receiving chemotherapy, this does not explain why the Court rejected the claims of Sandra Phillips (Jonathan's mother)

for the pain and fright she has suffered as a result of the refusal to provide her son chemotherapy treatment. Without objection from Defendants, there was compelling testimony that Jonathan's mother suffered fright as a result of the refusal to give Jonathan chemotherapy treatment. As testified by Jonathan's sister, Michelle Snodder: "She was at the point of a nervous breakdown ... she would sit in her bedroom and squall all the time because there was nothing else she could do." T.T., p. 249.

Mrs. Phillips herself testified about the suffering she (Mrs. Sandra Phillips) underwent as a result of the failure to provide the chemotherapy. She testified:

> I knew if my son didn't get it [chemotherapy], he was going to die. I mean an every minute thing, trying to figure out who to talk to, how to get him his chemo. I didn't want my son to die ... I couldn't sleep.

T.T., pp. 132-33.

Therefore, assuming that there could be no recovery for Jonathan's pain and suffering because this action was brought as a "wrongful death action" rather than a "survival" action, this does not explain why this Court did not allow Sandra Phillips to recover for her own pain and suffering. *Carey v. Piphus*, 435 U.S. 247 (1978), held that one who suffers mental injury because of violation of a constitutional right has a cause of action for damages under 42 U.S.C. § 1983. Here, Sandra Phillips made just such a claim and testified without objection in support of it. This Court's finding, on its own motion, that this was a wrongful death action, does not address Sandra

Phillips' claim for her own fright and suffering.[2]

CONCLUSION

This Court should reverse. It should apply 42 U.S.C. § 1988(a) to allow the wrongful death claim to be presented to a jury. It should allow Sandra Phillips to proceed on her claims for her own pain and suffering caused by the refusal to provide her son chemotherapy.

Respectfully Submitted,

BY: _____
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[2] Many cases stand for the principle that one whose own rights have been violated by the unconstitutional killing of another may maintain his own section 1983 action. *See League of Women Voters v. Nassau Co. Board of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984); *O'Malley v. Breirley*, 477 F.2d 785, 789 (3d Cir. 1973); *Brown v. Board of Trustees*, 187 F.2d 20, 25 (5th Cir. 1951). In this case, Plaintiff was simply asserting that the refusal to provide Jonathan chemotherapy her own constitutional right was violated by causing her needless suffering. This is an application of the principle of these cases. *See also, Coggins v. Carpenter*, 468 F.Supp. 270, 282 (D.C. Pa., 1979)("a person has standing to assert claims under 42 U.S.C. §1983 if that person was aggrieved or injured by the conduct, even if that person was not the object of the conduct allegedly in violation of 42 U.S.C. § 1983").

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CERTIFICATE OF SERVICE

I, JIM WAIDE, do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document, as well as a WP 3.5 disk to:

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THIS, the _____ day of November, 2002.

_____
JIM WAIDE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,
PLAINTIFF/APPELLANT,

VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
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DEFENDANTS/APPELLEES.

APPENDIX "A"*

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[* Appendix A consisted of the October 28, 2002, decision of the United States Court of Appeals for the Fifth Circuit which is reported at 311 F.3d 369 (5th Cir. 2002), and is reproduced at Pet. App. 1-12.]

CERTIFICATE OF SERVICE

I, JIM WAIDE, do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document, as well as a WP 3.5 disk to:

L. Bradley Dillard, Esq.
P. O. Box 7120
Tupelo, MS 38802

John Clay, Esq.
SAAG
P. O. Box 220
Jackson, MS 39205-0225

Leonard Vincent, Esq.
P.O. Box 38
Parchman, MS 38738

THIS, the _____ day of November, 2002.

_____
JIM WAIDE

WAIDE & ASSOCIATES, P.A.
ATTORNEYS AND COUNSELORS AT LAW

JIM WAIDE	**MAILING**	**STREET**
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Mr. Charles R. Fulbruge, III
Clerk, United States Court of Appeals
600 Camp Street, Room 109
New Orleans, LA 70130

Re: Sandra Phillips v. Monroe County, MS
No.: 01-60425

Dear Mr. Fulbruge:

Please find enclosed herein for docketing and filing the original and three (3) copies of the Plaintiff-Appellant's Petition for Rehearing in the above-styled matter, as well as a disk containing the same.

Consistent with my certificate, I have forwarded a copy of same to opposing counsel.

With kindest regards, I am

Sincerely yours,

JIM WAIDE

JDW/kd
Enclosures

cc: L. Bradley Dillard, Esq. (w/encl.)
John Clay, Esq. (w/encl.)
Leonard Vincent, Esq. (w/encl.)